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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-945

WOODROW SCOTT,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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The petitioner, Woodrow Scott, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of New Jersey entered on September 25, 1972.

OPINION BELOW

The Supreme Court of New Jersey denied a petition for certification and dismissed an appeal without filing an opinion. A copy of its judgment appears in Appendix A. The Appellate Division of the Superior Court of New Jersey entered an opinion which appears in Appendix B. This opinion is not reported, either officially or unofficially. No opinion was rendered by the Law Division of the Superior Court of New Jersey.

JURISDICTION

The judgment of the Supreme Court of New Jersey, denying certification and dismissing an appeal, was entered on September 25, 1972. This court's jurisdiction is invoked under 28 United States Code, Section 1257(3).

QUESTIONS PRESENTED

1. Whether petitioner's privilege against self-incrimination was abridged when his counsel was forced by the trial court to state in the hearing of the jury prior to trial the name of any defense witness, when the only potential defense witness was petitioner himself.

2. Whether petitioner's privilege against self-incrimination was abridged by the prosecutor's direction, in his opening statement, of the jury's attention to the question whether the defense would present any witnesses, after, in answer to the court's question in the presence of the jury, petitioner's counsel stated that the only potential witness was petitioner himself.

3. Whether a criminal defendant may be forced to elect, prior to presentation of either the State's opening or the State's evidence, whether the defendant will exercise his privilege against self-incrimination.

4. Whether petitioner, a negro, was entitled to a hearing into the jury selection process, after timely objection that the *venire* of fifty, from which the trial jury was to be selected, contained only one non-white, in a county in which the general population contains one non-white in six.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 14, Section 1:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 18:

Section 243. *Exclusion of jurors on account of race or color.*

> No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as a grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.00

STATEMENT OF THE CASE

Petitioner was indicted and convicted, after a jury trial, for possession of lottery slips on a single occassion, contrary to the provisions of Section 2A:121-3 of the New Jersey Statutes. Petitioner is quite obviously a negro. As soon as the *venire* of approximately fifty persons was brought into the court room, petitioner's counsel, out of the hearing of the jurors, relayed to the court an objection that defendant himself had made to counsel concerning the lack of non-whites on the *venire*. (There was actually one light-skinned negro in the group, although the transcript indicates that petitioner, his counsel and the prosecutor all were under the impression there was none.)

In answer to petitioner's objection, the court stated: "I don't care what he says." (Transcript of March 8, 1972 proceedings, page 2, line 25) Counsel persisted: "At least I think I should have the opportunity to direct something to that" (*Id.*, page 3, line 3). The court permitted counsel to make this statement on the record. "I represent to the court that this is not a representative panel . . ." (*Id.*, page 3, line 14).

Since counsel and petitioner had first seen the members of the panel only as they entered the courtroom, neither had any specific knowledge of the means by which this particular panel was selected. Section 2A:68-1, *et seq.*, of the New Jersey Statutes entrust the selection of the *veniremen* to two jury commissioners "who shall not be members of the same political party." Although the raw material for *venires* is the list of registered voters, the jury commissioners, after the examination of questionnaires containing the prospective juror's occupation, education, and experience, eliminate those who lack the qualifications required by Section 2A:69-1 or are exempt under

Section 2A:69-2 of the New Jersey Statutes. *State v. Forer*, 104 N.J. Super. 481, 250 A.2d 431 (L. Div. 1969).

The general population for Mercer County contained one non-white in six. 1970 *Census of Population, Advance Report, New Jersey, General Population Characteristics*. Despite the fact that non-whites occured more than eight hundred percent more frequently in the general population than in the *venire* in this case, the court neither conducted nor permitted an inquiry into the means by which it was selected. Immediately after the statement by petitioner's counsel that the panel was not representative, the court ruled: "There is no substantial basis for an application to discharge the jury or the failure to go on unless this court is apprised of any situation which might support the argument that they were not chosen—counsel should know that as far as that goes that the panels are now chosen by computer and the computers are fed with everything that has any relationship to just names and not color or race . . ." (*Id.*, page 4, lines 17 to 25). The court then noted that it was granting the defense an exception (*Id.*, page 5, line 4) and passed immediately to the selection and impaneling of a petit jury and the trial of the case.

The papers that the State contended were illegal lottery slips were taken from petitioner's pockets during a search conducted in a restroom by two detectives with no other persons present. The defense could logically consist only of denial either of the possession or that the slips had to do with lottery. Only petitioner and the two detectives had knowledge revelant to the issue of possession.

Expert testimony was admissible on the issue whether the slips had to do with lottery. However, the defense did not intend to call an expert, but to rely on the cross-

examination of the State's expert to raise a reasonable doubt in the minds of the jurors. The defense had not supplied the prosecutor with the name and address of any potential expert witness in advance of trial, as would have been required under *Rule* 3:13-3(d) Governing the Courts of the State of New Jersey.

Thus, the circle of potential witnesses for the defense was narrowed to petitioner himself. But, under New Jersey practice, the price petitioner would have had to pay for appearing as a witness in his defense was the revelation to the jury that he had previously been convicted of a crime not logically probative of the charge for which he was on trial, but supposedly relevant to petitioner's credibility. New Jersey Statutes, Section 2A:81-12; *State v. Sinclair*, 57 N.J. 56 (1970).

The petitioner's prior criminal conviction was recorded in the prosecutor's own files. The record in this case is silent as to whether the trial judge was actually made aware of it. He made no on-the-record inquiry either to the prosecutor or to petitioner's counsel whether petitioner had a criminal record. Nor did the court make any inquiry out of the hearing of the jury whether it was likely that petitioner would be called as a witness in his own defense. Instead, at an early stage in the jury *voir dire*, the court directed petitioner's counsel, in the hearing of the jury: "Would you introduce yourself and any of the witnesses that you intend to produce, please?" (Transcript of proceedings of March 8, 1971, page 15, line 9). This presented petitioner's counsel with a dilemma, whether to commit the defense to putting petitioner on the stand, despite his criminal record, or instead to answer unequivocally in the hearing of the jury that the defendant would not take the stand. Counsel replied: "As of the present time and it is again, I say this with reservation,

the witness that we will use will be the defendant, himself Woodrow Scott" (*Id.*, page 15, lines 17 to 20).

The prosecutor highlighted the question whether defendant would take the stand by saving these words for the very last in his opening statement to the jury: "Pay close attention to the witnesses who testify, State witnesses and indeed defense witnesses as well. There has been an indication that defense will call at least one witness. Thank you." (Transcript of the opening statements given on March 8, 1971, appearing in a different volume than the transcript of the other proceedings on that date, page 8, lines 9 to 12.)

After the presentation of evidence during which petitioner did not take the stand, the jury returned the verdict of guilty.

REASONS FOR GRANTING THE WRIT

1. Courts and prosecutors in New Jersey continue to invite adverse inferences from an accused's failure to testify in his own defense.

New Jersey is one of the few jurisdictions in the United States that has never had a provision in its State Constitution expressly guaranteeing the privilege against self-incrimination. *State v. Edelman*, 19 N.J. Super. 350, 357, 88 A.2d 516 (App. Div. 1952). Traditionally, New Jersey has permitted adverse comment by the prosecutor on the defendant's failure to take the stand. *Twining v. New Jersey*, 211 U.S. 78 (1908); *State v. Corby*, 28 N.J. 106, 117, 145 A.2d 289 (1958). Prosecutors in New Jersey overtly continued the practice even after the decision of this court in *Griffin v. California*, 380 U.S. 609 (1965), making it necessary for the Supreme Court of New Jersey to tell the prosecutors that the explicit language of *Griffin* meant what it said. *State v. Lanzo*, 44 N.J. 560, 563, 210 A.2d 613 (1965).

However, trial courts and prosecutors in New Jersey continued to seek ways to circumvent *Griffin*. *State v. Smith*, 100 N.J. Super. 420, 426, 242 A.2d 49 (App. Div. 1968); *State v. McElroy*, 96 N.J. Super. 582 (App. Div. 1967), *certification denied*, 53 N.J. 512, 251, A.2d 450 (1969); *State v. Sinclair*, 49 N.J. 525, 549 (1967); *State v. Pickles*, 46 N.J. 542, 579 (1966); *State v. Persiano*, 91 N.J. Super. 299, 301 (App. Div. 1966). The present case presents a further example of the failure of the New Jersey trial practice to accommodate to *Griffin*, with the prosecutor capitalizing on the court's inadvertent wandering into the proscribed area and affirmatively asking the jury in his opening statement to be on the alert to see whether the defendant would take the stand.

Apparently nothing short of a reversal by this court of a conviction in a New Jersey state court will convince New Jersey prosecutors once and for all that *Griffin* applies here as well as in California. The prosecutors are probably encouraged in their obstinacy by the failure of the Legislature to repeal Section 17 of Chapter 52 of the New Jersey Laws of 1960 which added *Rule* 23, Subsection (4) to Section 2A:84A-17 of the New Jersey Statutes. This subsection provides:

> "If an accused in a criminal action does not testify after direct evidence is received of facts which tend to prove some element of the crime and which facts, if untrue, he could disprove by his own testimony, counsel and the judge may comment on his failure to testify, and the trier of fact may draw an inference that accused can not truthfully deny those facts."

2. Requiring disclosure of the names of witnesses during the *voir dire* abridges the privilege against self-incrimination by compelling premature election whether to exercise it.

The court, during the *voir dire*, required counsel to state in the jury's presence the names of any defense witnesses, even though the only possible one was the accused himself. In such a case, the mere putting of the question exerts pressure on the defense either to elect prematurely whether to use the privilege, or to give an ambivalent answer which tends to create the impression in the jury's mind that the defense is dissembling.

In *Brooks v. Tennessee*, 406 U.S. 605 (1972), this court held unconstitutional a state rule requiring an accused to testify ahead of other defense witnesses if he chooses to take the stand. The underlying policy consideration was that the accused should be allowed to keep open the option of testifying or exercising the privilege

against self-incrimination until the close of the case for the defense. Even though in the present case the defense was not actually forced to make the election, protection of the goal of mature election requires the proscription of the trial court's premature request in the hearing of the jury that the accused make an election.

3. Defendant, a negro, was denied the right to trial by a representative jury.

There was only one chance in one thousand that a panel of fifty jurors selected at random from the general population of Mercer County, New Jersey would include forty-nine whites, as it did here. The establishment of this, mathematically, was elaborated on pages 25 through 27 of the brief filed by petitioner as the appellant in the Appellate Division of the Superior Court of New Jersey.

The most recent published Annual Report of the Administrative Director of the Court of New Jersey (1969-1970) shows on Table D-7 on page 68 that there were only 143 criminal jury trials in Mercer County in the court year. According to the law of probability, an accused would face a panel of fifty prospective jurors, with one and only one non-white, only once in seven years. The frequency with which this would happen in a case where the defendant is black, and the judge, the prosecutor, and all the state's witnesses are white, would be much less.

The improbability of these facts coalescing from random factors is so strong that the trial court here should have responded to the accused's immediate objection and made, or permited the defense to make, an inquiry into the causation of the practically all white jury panel.

In denying all relief, the court adverted to the original selection of jury panelists from voting lists by computer. However, the record does not disclose the later jury selec-

tion steps taken by the commissioners in this case. The names initially selected by the computer had questionnaires mailed to them. But petitioner believes answering the questionnaires is neither followed up by investigation nor compelled by subpoena. Because of the problems arising from overcrowded housing conditions, higher occupancy of housing per unit, higher transciency, lower levels of literacy, and unfamiliarity with forms and official papers there is a smaller proportion of non-white prospective jurors voluntarily responding to the questionnaires than whites, particularly where the non-whites are largely huddled together in a deteriorating central city such as Trenton, the county seat of Mercer County and the scene of the crime charged.

It is no answer that urban non-whites may prefer not to serve on juries. The accused has a right to a representative jury. *Peters v. Kiff*, 407 U.S. 493 (1972).

The jury commissioners should be made to take every means necessary to safeguard the right of the accused to a representative jury. If a lesser portion of non-whites, or any other segment of the population, responds to questionnaires sent out by the jury commissioners, the commissioners should be required to do more follow up, whether by investigation, or the use of the subpoena or contempt power, to whatever extent necessary. The trial court here should have inquired further into the predominance of whites on this jury.

Many cases have held that mathematical probabilities are admissible, with other evidence, to establish the accused's *prima facie* case of a non-representative jury, shifting to the state the burden of showing that the *venire* had been drawn on a non-discriminatory basis. *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Whitus v. Georgia*, 385 U.S. 545 (1967); *State v. Smith*, 9 Crim. L. Rep. 2125 (Mo. Sup. Ct. 1971).

Here the only evidence that was before the trial court was the "monochromatic" composition of the *venire*. But the failure to adduce other evidence was not the fault of the accused who made timely objection but was given no opportunity to inquire by the trial court.

The opinion of the Appellate Division of the Superior Court of New Jersey shows that it missed the point of petitioner's argument. It stated that "his argument is that he has a consitutional right to a jury panel and a jury containing blacks equal in number to the ratio of black to white population in the county."

But the heart of the argument that petitioner made on this point before the Appellate Division, appearing on page 28 of his brief, was as follows:

> "But the improbabilty of such a panel of fifty prospective jurors having resulted from a random selection is so strong, that the judge should have responded to defense counsel's immediate objection and made or permitted the defense to make some inquiry into its causation."

The argument was restated on page 5 of the Petition for Certification to the Supreme Court of New Jersey as follows:

> "The argument that petitioner made and makes is not that he has a right to a jury panel containing one nonwhite in every six members. Rather, it is that he has a right to a jury selected at random from the general population, that the improbability of this panel resulting from a random selection is so great that, upon timely objection, the court should have investigated the randomness of the selection before proceeding to trial."

In denying certification, the Supreme Court of New Jersey wrote no opinion.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

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December 19, 1972

Appendix "A"

IN THE

SUPREME COURT OF NEW JERSEY

C-6 SEPTEMBER TERM 1972

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

WOODROW SCOTT,
Defendant-Petitioner.

On Petition for Certification
(Filed September 25, 1972)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied. It is further Ordered that the request for leave to appeal is denied.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 21st day of September, 1972.

/s/ Florence R. Peskoe
FLORENCE R. PESKOE
Acting Clerk
of the Supreme Court

A TRUE COPY

/s/ Florence R. Peskoe
FLORENCE R. PESKOE
Acting Clerk

Appendix "B"

Opinion of the Superior Court of New Jersey Appellate Division A-2310-70

Submitted June 5, 1972—Decided June 16, 1972.

Before Judges Sullivan, Leonard and Carton.

On appeal from Mercer County Court, Law Division.

Messrs. Teich, Groh & Robinson, attorneys for defendant-appellant (Mr. William L. Boyan on the brief).

Mr. Bruce M. Schragger, Mercer County Prosecutor, attorney for plaintiff-respondent (Mr. Andrew J. Smithson, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant was convicted of possession of lottery slips and was sentenced to one year in the Mercer County workhouse and was fined $1,000.

On appeal defendant argues that he was denied a fair trial by virtue of the State's implications that he was connected with organized crime. Suffice it to note that the record does not support this assertion. He contends that he was also denied a fair trial by the State's unnecessary references to a search warrant and the search of defendant's automobile. We find the references were entirely appropriate under the circumstances. Next he argues that comments during trial by both the Court and prosecutor regarding the State's expert witness Lt. Marut, denied him a fair trial. We conclude that the comments and remarks did not prejudice defendant in any way.

Argument is also made that defendant was denied a trial by a jury of his peers since he is a Black and there

was only one Black on the fifty-member jury panel used in defendant's case. Presumably his argument is that he has a constitutional right to a jury panel and a jury containing Blacks equal in number to the ratio of Black to White population in the County. We know of no legal support for this argument.

Finally, defendant makes the legally frivolous argument that he was denied the right to confront his accusers, namely, the members of the Grand Jury who presented the indictment against him "on their oath." Defendant argues that the indictment was testimony offered by persons whom defendant had no opportunity to confront.

Affirmed.

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/s/ Mortimer G. Newman, Jr.
MORTIMER G. NEWMAN, JR.